PETRA JAYA TRANSPORT (S)

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[CRIMINAL APPEAL NO: 41-17-98-II]
11 JUNE 1999

EMPLOYEES PROVIDENT FUND: *Arreas of contributions - Failure to pay - Employer convicted under s. 43(2) of Employees Provident Fund Act 1991 - Whether employer must pay contributions which were subject matter of conviction - Whether employer must pay contributions of other employees which were not subject matter of charge - Interpretation of s. 63(1)*

WORD & PHRASES: *"the amount of contributions" - Employees Provident Fund Act 1991, s. 63(1)*

The appellant was charged and convicted under s. 43(2) of the Employees Provident Fund Act 1991 ('the EPF Act') for failing to pay EPF contributions in respect of one of its employees. Thereafter, the respondent applied under s. 63(1) of the EPF Act, seeking an order that the appellant pay the outstanding arrears of contributions for its other employees against which no charge had been preferred against the appellant. The appellant objected to this application.

Held:

[1] Section 63(1) of the EPF Act refers to "the amount of contributions" and cannot mean "all contributions." It cannot be the intention of the legislature that once an employer is found guilty of an offence under s. 43(2) or 48(3) of the EPF Act, the court shall order the employer to pay all the contributions of all its other employees which are not the subject matter of the charge as it will be inequitable to order so. The proper interpretation of s. 63(1) of the EPF Act is that the court shall order the employer to pay all the contributions of that employee which were the subject matter of the charge.

[Respondent's application dismissed.]

Case(s) referred to:

Nairn v. University Of St Andrews [1909] AC 147 ***(refd)***

New Plymouth Borough Council v. Taranaki Electric-Power Board [1933] AC 680 ***(refd)***

Nothman v. Barnet London Borough Council [1978] 1 WLR 221 ***(refd)***

Pontian Bas Bhd v. PP [1987] 2 MLJ 646 ***(foll)***

PP v. Kats Cleaning Services(s) Sdn Bhd [1995] 1 CLJ 561 ***(refd)***

PP v. LCY Holdings Sdn Bhd [1991] 3 CLJ 2812 ***(refd)***

PP v. Silectron Sdn Bhd [1993] 2 AMR 1172 ***(refd)***

PP v. Sykt Soon Seng Electrical Work (High Court Shah Alam, Criminal Appeal No: 51-39-88) ***(refd)***

Spillers, Ld v. Cardiff (Borough) Assessment Committee [1931] 2 KB 21 ***(refd)***

United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121 ***(refd)***

Wong Pot Heng v. Hj Zainal Abidin Puteh & Anor [1990] 2 CLJ 174 ***(refd)***

Legislation referred to:

Employees Provident Fund Act 1951, ss. 16A(1)(c), (4), 18A

Employees Provident Fund Act 1991, ss. 43(2), 48(3), 63(1)

Employee's Social Security Act 1969, ss. 7, 94(c), 94A(1)

Employees' Social Security (General) Regulations 1971, reg. 32

For the appellant - HC Lee; M/s HC Lee & Partners Advoc

For the respondent - Marutin Pagan DPP

Reported by Farah Naim

JUDGMENT

Muhammad Kamil Awang J:

The appellant was charged with three counts under s. 43(2) of the Employees Provident Fund Act 1991 (EPF Act) for failing to pay EPF contribution in respect of three of its employees. The magistrate found the appellant guilty on one charge, convicted and fined him RM1,200 in default one month imprisonment. The appellant appealed against the conviction and sentence, but later the appeal was withdrawn and it was struck off on 9 April 1999.

On 29 September 1998 the respondent by an application under s. 63(1) EPF Act 1991, sought a court order that the appellant pay the outstanding arrears of contributions of other employees of the appellant for which no charge had been preferred, and which amounted to RM149,709. The appellant objected to this application and in support cited *Public Prosecutor v. Silectron Sdn Bhd* [1993] 2 AMR 1172.

Deputy Public Prosecutor submitted that s. 63(1) of the EPF Act is mandatory. A person who is convicted of an offence under s. 43(2) or 48(3) of the Act, shall pay the arrears of contribution as certified by the accountant of the EPF.

Learned counsel, Mr. H.C. Lee, submitted that there were two conflicting authorities on the interpretation of the provisions of law on the payment of contributions which is the subject matter of an offence committed under two different statutes, namely the view held by *Public Prosecutor v. Silectron Sdn Bhd (supra)* and the view held by *Public Prosecutor v. Kats Cleaning Services(s) Sdn Bhd* [1995] 1 CLJ 561.

It is observed that these two cases can be distinguished, the former case is on the interpretation of ss. 16A(1)(c) and 16A(4) of the EPF Act 1951 (which Act was amended by the EPF (Am) Act 1980 and later replaced by the EPF Act 1991), and the latter is on ss. 7 and 94A(1) of the Employee's Social Security Act 1969. Both cases are not directly on the interpretation of s. 63(1) of the 1991 Act which is under consideration in the instant case, and therefore they are of persuasive value only.

Section 63(1) of the 1991 Act states:

> Section 63. **Court Order**
>
> (1) Notwithstanding the provisions of any other written law, where an employer is guilty of an offence under section 43(2) or 48(3), the Court before which the employer is found guilty shall order such employer to pay to the Fund the amount of contributions, together with any dividend credited thereon, due and payable to the Board and certified by an officer authorized by the Board to be due from such employer, prior to the date of such finding of guilt.

In approaching the question of interpreting words used in statutes it is necessary to keep in mind the presumption that words in a statute are strictly and correctly used. As Lord Hewart CJ said:

> It ought to be the rule, and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred. *Spillers, Ld v. Cardiff (Borough) Assessment Committee* [1931] 2 KB 21, quoted with approval by Lord McMillan in *New Plymouth Borough Council v. Taranaki Electric-Power Board* [1933] AC 680, 682.

It is also necessary to remember the caution given by Lord Loveburn LC in *Nairn v. University Of St Andrews* [1909] AC 147, 161:

> It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to cany out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are.

In this interpretation of s. 63(1) of the 1991 Act, it is necessary to find out the intention of Parliament in enacting this statute by using the purposive approach. In *United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121, Chang Min Tat FJ said:

> The literal method of construction is now completely out of date and has been replaced by a "purposive approach". It ought to be noted that this purposive approach is not a modem fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act "according to the intent of them that made it": Coke 4 Inst. 330.

Citing Lord Denning's decision in *Nothman v. Barnet London Borough Council* [1978] 1 WLR 221, the learned judge said:

> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in if necessary – so as to do what Parliament would have done, had they had the situation in mind.

In *Wong Pot Heng v. Hj Zainal Abidin Puteh & Anor* [1990] 2 CLJ 174, Mohd. Azmi SCJ (as he then was) said that:

> The purposive construction of statutes was first adopted by the House of Lords in *Foothergill v. Monarch Airlines H.L.(E)* [1980] 3 WLR 221. It is a well established principle that the purposive approach to the interpretation of legislation only applies where any doubt arises from the terms or words employed by the legislature. But where the words are precise and unambiguous, then the literal and strict construction rule should apply.

It is clear from s. 63(1), that an employer who is found guilty of the offence under s. 43(2) or s. 48(3) of the EPF Act, the court shall make an order that the employer pay the Fund the amount of contributions, together with any dividend credited, as certified by an officer of the Board.

It seems to me, using the purposive approach of construction, that the order to pay the contributions, does not form part of the penalty as imposed by the offence under s. 43(2) or s. 48(3), *ibid*. That is to say, the Board has to calculate and submit the amount of contributions as computed by the Board ie, its authorised officer, to the employer. To my mind, the certificate by the Board is not a conclusive evidence and it is open to challenge by the employer as to the correctness of the contents in the certificate. It is fair and just that the employer must be given the opportunity to do so. There are a number of reasons for this. First, there is nothing in the 1991 Act to say that the certificate is conclusive and cannot be challenged. Secondly, if the employer is obliged to pay such contributions, it is fair that he must be given the opportunity to satisfy himself as to the correctness of the amount which he has to pay. This found support in *Pendakwa Raya lwn. LCY Holdings Sdn Bhd* [1991] 3 CLJ 2812, where Abdul Aziz J in interpreting the old s. 16A(4) of 1951 Act as amended by Akta KWSP (Pindaan) 1980, said:

> [4] Di bawah subs. (4) baru amaun caruman dan dividen yang wajib diperintahkan oleh mahkamah supaya dibayar bukan sahaja sebagaimana diperakui oleh pegawai lembaga kumpulan wang sebagai kena dibayar yang diperuntukan (di bawah subs. (4) lama) tetapi mestilah juga "due and payable to the board". Syarat tambahan ini bererti ini membawa implikasi bahawa ketepatan perakuan itu boleh dicabar.

In *Pendakwa Raya lwn. Syarikat Soon Seng Electrical Work* (Shah Alam High Court Criminal Appeal No. 51-39-88), in respect of s. 16A(4) of the EPF Act 1951 Shankar J (as he then was) was of the opinion that under s. 18A of the Act makes the certificate *prima facie* evidence of the truth of the contents. As the respondent did not challenge the certificate, the court must make the order asked for.

In *Public Prosecutor v. Silectron Sdn Bhd's* case *(supra)* the respondent was charged and convicted in relation to two offences under s. 16A(1)(c) of the EPF Act 1951. The appellant then applied for an order under s. 16A(4) of the Act for the respondent to make payment in respect of the outstanding arrears which were not comprised in the charge. The learned magistrate dismissed the application. The appellant appealed. The High Court held:

> (i) Bearing in mind the whole scheme of s. 16A and the words in (4) "Upon being found guilty of any offence under s. 16A(1)(c)", the only order which the court must make under s. 16A(4) is one that relates only to the contribution which is the subject matter of the offence under s. 16A(1)(c) for which there has been a guilty verdict; and

(ii) Laws which impose criminal or other penalties, such as the EPF Act must be strictly construed and any ambiguity in the words must be resolved in favour of the citizen.

In *Pontian Bas Bhd v. Public Prosecutor* [1987] 2 MLJ 646, LC Vohrah J held that the provisions of s. 16A(4) are mandatory and they impose an obligation on the part of the Court to order the employer to pay the arrears upon conviction after certification by the Board's Accountant of the arrears owing prior to the date of the conviction. It was also held that the arrears of contributions by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty. In that case the appellant was charged under s. 16A(1)(c) of the EPF Act 1951 for failing as an employer to remit contributions in respect of certain employees. The appellant pleaded guilty to the charges and was convicted and fined for a sum of $4,320. The appellant was ordered to pay the Board arrears of contributions amounting to $28,325. See also *Pendakwa Raya lwn. LCY Holdings Sdn Bhd (supra)*.

In *Public Prosecutor v. Kats Cleaning Services* case *(supra)*, the defendant pleaded guilty to six offences under s. 7 of the Employees' Social Security Act 1969 and reg. 32 of the Employees' Social Security (General) Regulations 1971 for failing to pay the required contributions in respect of their employees. The prosecution tendered the Certified Statement of Arrears of Contributions under s. 94(c) of the Employees Social Security Act 1969. Learned magistrate declined to make the order, and held that the prosecution could only recover contributions in respect of the subject matter of the offence for which there is a finding of guilt but not otherwise. On appeal, the High Court held that s. 94A(1) of the Act empowered the court to make an order in respect of any contributions which were not the subject matter of the charge against the respondent and for which there was no finding of guilt.

Section 16A(4) of the 1951 Act reads:

> (4) Upon being found guilty of any offence under section 16A (1)(c), the Court before which the employer is found guilty shall order such employer to pay to the Board the amount of any contributions, together with any interest credited thereon, due and payable to the Board and certified by the Accountant of the Board to be due from such employer, prior to the date of such founding of guilty and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under section 426 of the Criminal Procedure Code.

Learned counsel for the appellant submitted that s. 16A(4) EPF Act 1951 is replaced by s. 63(1) of the EPF Act 1991. In the instant case, the respondent applied to the court for an order against the appellant for arrears of contribution of the other employees as well which amounted to RM149,719. He urged the court to follow the *ratio decidendi* of the case of *Public Prosecutor v. Silectron (supra)*.

Under s. 16A(4) of the 1951 Act, the words used are "the amount of any contributions" whilst in s. 63(1) of the 1991 Act the words used are "the amount of contributions". Learned counsel contended that in the former, it has a wider meaning and may include other contributions which are not the subject matter of the charged preferred against the accused, whereas in the latter, it has a narrow and restrictive meaning and it refers only to the contributions and its arrears of the employee whose contribution is the subject matter of the charge.

In *LCY Holding's* case, Abdul Aziz J opined that the words "any contributions" in s. 16A(4) (as amended), have the effect of "all contributions". In my view, the provisions in s. 63(1) refers to "the amount of contributions" and they cannot mean "all contributions" or have such effect. They mean the amount of contributions which is the subject matter of the charge. I do not think that it is the intention of the legislature that when an employer is found guilty of an offence under s. 43(2) or 48(3) of the 1991 Act, the court shall order him to pay all the contributions of its other employees who are not the subject-matter of the charge. It is inequitable. The proper interpretation of s. 63(1) of the Act is that the court shall order the employer to pay all the contributions of the employee which is the subject matter of the charge, prior to the finding of guilt of the employer.

I agree with the *ratio decidendi* in the case of *Pontian Bas Bhd v. Public Prosecutor (supra)* that the provisions in s. 16(4) of the 1951 Act are mandatory, just as they are in s. 63(1) of the 1991 Act, it is incumbent upon the court to make any order thereunder that the employer, once convicted for an offence under s. 43(2) or s. 48(3) of the 1991 Act, must pay the arrears of contributions in respect of the employee.

In the instant case, the appellant had challenged the certificate of the Board, and it was heard by the learned magistrate, who ordered the appellant to pay the arrears contributions in respect of the 3rd charge only, ie, its employee, named Sahad @ Bujang Gendot. The magistrate was correct in law.

In the circumstances the appeal by the Deputy Public Prosecutor is hereby dismissed.